No. 86-1747

In the Supreme Court of the United States

OCTOBER TERM, 1986

ADOLF MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in declining to review the obscenity of photographs that petitioner, at trial, had stipulated were obscene.

2. Whether petitioner's consecutive sentences for transporting in foreign commerce visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. (Supp. III) 2252(a)(1), and for importing obscene photographs, in violation of 18 U.S.C. 545 and 19 U.S.C. 1305, violated the Double Jeopardy Clause.

3. Whether petitioner's consecutive sentences were disproportionate to his offenses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 802 F.2d 348.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1986. A petition for rehearing was denied on February 25, 1987 (Pet. App. B). The petition for a writ of certiorari was filed on April 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts, petitioner, a resident alien, was convicted of transporting in foreign commerce visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. (Supp. III)

2252(a)(1), and of importing obscene photographs, in violation of 18 U.S.C. 545 and 19 U.S.C. 1305. Petitioner was sentenced to ten years' imprisonment on the first count and five years' imprisonment on the second, the terms to run consecutively. The court of appeals affirmed (Pet. App. 1-10). On April 13, 1987, the district court suspended the entire sentence and placed petitioner on five years' probation. The Immigration and Naturalization Service subsequently ordered petitioner excluded from the country.

1. The evidence at trial, as stipulated to by petitioner, showed that on June 30, 1984, petitioner crossed from Mexico into California and presented himself for inspection at the San Ysidro port of entry. Petitioner was driving a pickup truck with a camper attached and was accompanied by a 15-year-old boy. A Customs Service inspector, upon searching the vehicle, found a binder containing numerous photographs, most of which depicted young males in various nude poses and one of which showed petitioner engaged in oral sex. Petitioner stated that he had picked up the 15-year-old boy four or five months earlier while the youth was hitchhiking near his home in Holbrook, Arizona. Since that time petitioner and the boy had been traveling together. The boy had at first refused to engage in sexual relations with petitioner, but after a week petitioner had persuaded him to do so, and thereafter petitioner continued to have sexual relations with the boy. The 15-year-old identified himself as the subject of three of the photographs that had been found in the vehicle (GXs 1-3), and petitioner stated that he had taken the photographs. Among the other photographs in petitioner's vehicle were ten (GXs 4-13) of a 17-year-old boy who, upon being located by Customs inspectors, stated that petitioner had taken the photographs and that petitioner had engaged in frequent sexual relations with him. E.R., Stipulation, at 1-5.

At trial, petitioner and his attorney signed a stipulation that recited the above facts. The stipulation then stated (E.R., Stipulation, at 5):

> 13. If called to testify, an expert for the government would state that photographs 1 through 13 depict minor children under the age of 18 engaged in "sexually explicit conduct," specifically a lewd exhibition of the genitals, as defined in Title 18, United States Code, Section 2255. Further, the photographs are obscene, and therefore prohibited from importation as provided by Title 19, United States Code, Section 1305, and in violation of Title 18, United States Code, Section 545.

The stipulation further stated (E.R., Stipulation, at 5-6) that petitioner "expressly recognizes the very strong likelihood that he will be found guilty of the charges contained herein." After recounting petitioner's recognition and waiver of various rights, the stipulation concluded (*id.* at 7):

> 18. [It is further stipulated t]hat this stipulation is being entered into by the defendant for the purpose of preserving for appellate review his pretrial motions and further, that the defendant does not contest for the purpose of appellate review, the sufficiency of the evidence in this case to sustain his conviction.

On February 20, 1985, the stipulation and the 13 photographs were admitted as the sole evidence on which petitioner's bench trial was to be based (Tr. 1, 8-9). The court conducted an extended colloquy with petitioner to determine his understanding of the rights he was waiving, his sentencing exposure if convicted, and the voluntariness of his waivers (*id.* at 3-8). Petitioner's counsel stated that "the stipulation that [he and petitioner] submitted to the Court is that Photographs 1 through 13 are obscene" (*id.* at 10). The district court thereupon adjudged petitioner guilty of both charges and specifically found that each of the photographs

was obscene and that each depicted minor children engaged in a lewd exhibition of the genitals (*id.* at 11).

2. The court of appeals affirmed (Pet. App. 1-10). The court declined to review the obscenity of the photographs, holding that petitioner was bound by the stipulation he had signed at trial (*id.* at 5).[1] The court also rejected (*id.* at 10) petitioner's double jeopardy attack on the imposition of consecutive sentences for violating 18 U.S.C. 545 (by violating 19 U.S.C. 1305) and 18 U.S.C. (Supp. III) 2252, finding that the two offenses constituted separate offenses under the test established in *Blockburger* v. *United States*, 284 U.S. 299 (1932). Finally, the court rejected (Pet. App. 7-9) petitioner's claim that his sentence was unduly and unconstitutionally harsh, concluding that it was within the range prescribed by statute and was justified by petitioner's background and by the expert testimony that had been introduced concerning the harm to pedophile victims and the unlikelihood of successful treatment for petitioner.

ARGUMENT

1. Petitioner first contends (Pet. 5-9) that the court of appeals erred in refusing to conduct an independent review of the 13 photographs at issue in order to determine whether they were obscene or constituted "child pornography" (*id.* at 9). This contention is meritless.

In obscenity cases and in other First Amendment cases, this Court has stated that appellate courts must make "an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected" (*Jacobellis* v. *Ohio*, 378 U.S. 184, 190 (1964) (footnote omitted)). See *Bose Corp.* v. *Consumers Union*

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[1]The court noted that petitioner's claim of ineffective assistance of counsel could be considered only in collateral proceedings (Pet. App. 5).

of United States, Inc., 466 U.S. 485, 498-511 (1984); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964); *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963); *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946). The "independence" required, however, is independence from the binding effect of the fact-finder's conclusions, not from the litigants' own concessions. Independent appellate review is not required when the litigants voluntarily and knowingly stipulate that the material in question does not meet the standards for constitutional protection. Indeed, this Court has so held. *New York* v. *Ferber*, 458 U.S. 747, 774 n.28 (1982) (citation omitted) ("There is no argument that the films sold by respondent do not fall squarely within the category of activity we have defined as unprotected. Therefore, no independent examination of the material is necessary to assure ourselves that the judgment here 'does not constitute a forbidden intrusion on the field of free expression.' ").[2]

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[2] *Cote* v. *United States*, 413 U.S. 915 (1973), does not establish the contrary. The court of appeals in that case held that the defendant, having pleaded guilty to several counts of mailing obscene films, could not contest the obscenity of the material on appeal (470 F.2d 755, 756 (5th Cir. 1972)), but the court entertained, and rejected on the merits, the defendant's constitutional challenge to the statute involved, 18 U.S.C. 1461. This Court granted certiorari, vacated the judgment, and summarily remanded for further consideration in light of *Miller* v. *California*, 413 U.S. 15 (1973), and its companion cases, which changed the constitutional standard for determining whether a work is obscene. The *Cote* decision was one of nearly 80 summary remands for further consideration in light of *Miller* (see 413 U.S. 902-906, 909-916; 414 U.S. 953, 955, 961-962, 964, 966-967, 969, 992, 994).

The summary remand in *Cote* simply permitted the court of appeals to determine how *Miller*'s intervening change in the law would affect the court's judgment, including the validity of the defendant's guilty plea, which was made under pre-*Miller* law. In this case, there has been no intervening change in relevant legal standards, and there is no reason to look behind petitioner's concession.

Here, petitioner stipulated at trial to the obscenity of the photographs in question. The court of appeals found (Pet. App. 5) that petitioner had knowingly and voluntarily entered into that stipulation. Accordingly, the court of appeals correctly held petitioner bound by the stipulation and declined to review the obscenity of the photographs. See *United States* v. *Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986) (stipulations "freely and voluntarily entered into in criminal trials are as binding and enforceable as those entered into in civil actions"); *United States* v. *Keck*, 773 F.2d 759, 770 (7th Cir. 1985) (stipulations as to material facts are facts conclusively proved); *United States* v. *Harding*, 507 F.2d 294 (10th Cir. 1974), cert. denied, 420 U.S. 997 (1975) (holding defendant on appeal to his stipulation at trial that the material in question was obscene); *Spillman* v. *United States*, 413 F.2d 527, 531 (9th Cir.), cert. denied, 396 U.S. 930 (1969).[3]

In any event, there was plainly a factual basis for finding that the photographs at issue in this case were obscene. In *Miller* v. *California, supra*, the Court stated (413 U.S. at 25 (emphasis added)) that government regulation could constitutionally extend to, among other things, "[p]atently offensive representations or descriptions of masturbation, excretory functions, and *lewd exhibition of the genitals*." See also *New York* v. *Ferber*, 458 U.S. at 765 (the " 'lewd

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[3]In *Clicque* v. *United States*, 514 F.2d 923 (5th Cir. 1975), on which petitioner relies (Pet. 7 n.3), the defendant pleaded guilty to mailing an obscene letter, but the letter was not reproduced or even described in the indictment, and the district court accepted defendant's plea solely on the basis of the indictment, without ever having seen the letter. On collateral attack of the conviction, the court of appeals held that the district court's acceptance of the defendant's guilty plea without first examining the letter to ascertain its obscenity ran afoul of the First Amendment. Here, by contrast, the district court received the photographs in evidence before finding them to be obscene and adjudicating petitioner's guilt.

exhibition of the genitals' " can render a work legally obscene). Contrary to petitioner's assertions (Pet. 4-5), the photographs here are not simply pictures of nude boys. Rather, the majority of the photographs focus exclusively on the boys' genitals, which, in some of the photographs, are in a state of full arousal and, in at least one of the photographs, are being fondled.

Finally, petitioner's claim that the court of appeals should have independently determined whether the photographs constituted "child pornography" (as well as their obscenity) is meritless. Whether the photographs are constitutionally unprotected child pornography is a question not in the case. Petitioner has never disputed that the photographs depicted minors engaged in sexually explicit conduct, specifically the lewd exhibition of the genitals, within the meaning of 18 U.S.C. (Supp. III) 2252. See also E.R., Stipulation para. 13 (quoted page 3, *supra*). And petitioner has never challenged the constitutionality of 18 U.S.C. (Supp. III) 2252. In any event, the photographs at issue plainly come within the statute's proscription, and the statute is plainly constitutional under *New York* v. *Ferber, supra.*

2. Petitioner argues (Pet. 9-12) that his consecutive sentences for transporting visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. (Supp. III) 2252, and for importing obscene photographs, in violation of 18 U.S.C. 545 and 19 U.S.C. 1305, constituted multiple punishment prohibited by the Double Jeopardy Clause. The court of appeals properly rejected this contention (Pet. App. 10).

The permissibility of cumulative punishments for the same conduct under the Double Jeopardy Clause is a matter of legislative intent. See *Ohio* v. *Johnson*, 467 U.S. 493, 499 & n.8 (1984); *Missouri* v. *Hunter*, 459 U.S. 359, 366,

368 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 343-344 (1981); *Whalen* v. *United States*, 445 U.S. 684, 691-693 (1980). The Court, moreover, "has consistently relied on the test of statutory construction stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), to determine whether Congress intended the same conduct to be punishable under two criminal provisions." *Ball* v. *United States*, 470 U.S. 856, 861 (1985). Under *Blockburger*, "[t]he appropriate inquiry * * * is 'whether each provision requires proof of a fact which the other does not.' " *Ball*, 470 U.S. at 861 (citation omitted). This inquiry focuses on the statutory elements of the offenses charged and not on the allegations of the indictment or on the government's proof at trial in a given case. See *Albernaz*, 450 U.S. at 337-338; *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

Here, as the court of appeals correctly concluded, the offenses of which petitioner was convicted each include at least one statutory element that the other does not. A violation of 18 U.S.C. 545 and 19 U.S.C. 1305 requires that the photographs be obscene, whereas a violation of 18 U.S.C. (Supp. III) 2252 does not (see H.R. Rep. 98-536, 98th Cong., 1st Sess. (1983)). A violation of 18 U.S.C. (Supp. III) 2252 requires that the photographs involve a minor, whereas a violation of 18 U.S.C. 545 and 19 U.S.C. 1305 does not.

Petitioner seeks to avoid this conclusion by arguing (Pet. 10) that every importation violation of 18 U.S.C. (Supp. III) 2252 is also a violation of 18 U.S.C. 545 because the latter statute prohibits importation of any merchandise "contrary to law." Petitioner's approach is misguided. Section 545, by its terms, cannot be viewed in isolation from a "law" defining importation restrictions. Accordingly, it is the combined elements of Section 545 and the incorporated law that define the statutory elements of the offense. Cf. *Whalen* v. *United States*, 445 U.S. at 694 (double jeopardy

analysis focused on the element of rape in a statute that covered rape and several other offenses as well). Here, the offense charged was the importation of photographs in violation of 19 U.S.C. 1305, which proscribes the importation of obscene material. Because that statute requires proof of an element that 18 U.S.C. (Supp. III) 2252 does not, the court of appeals correctly concluded that petitioner's consecutive sentences were permissible.

3. Petitioner finally contends (Pet. 12-14) that the district court, in pronouncing sentence, improperly took into account petitioner's homosexual relations with the boys portrayed in the photographs and that the resulting 15-year sentence was therefore disproportionate to the crimes of which he was actually convicted. This claim has largely been mooted, because the district court, on April 13, 1987, suspended petitioner's 15-year sentence and placed him on five years' probation. In any event, the court of appeals correctly held that the district court's consideration of petitioner's homosexual activity with two minors and the sentence were proper.

In determining the appropriate sentence in a particular case, a sentencing judge may consider a wide range of information concerning the defendant's background, character, and conduct. *Wasman* v. *United States*, 468 U.S. 559, 563 (1984); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *United States* v. *Givens*, 767 F.2d 574, 585 (9th Cir. 1985), cert. denied, No. 85-5490 (Nov. 4, 1985); *United States* v. *Lemon*, 723 F.2d 922, 932 (D.C. Cir. 1983). Here, the trial court heard extensive testimony on the characteristics and recidivist tendencies of pedophiles, as well as on the severe psychological and emotional injury that pedophile victims may suffer (Pet. App. 7). Petitioner himself stipulated that he took the photographs in question and that he engaged in sexual activity with the minors involved. This information was obviously relevant to petitioner's sentencing, since one of the central purposes of 18 U.S.C. (Supp.

III) 2252 was to combat the sexual exploitation of minors (see S. Rep. 95-438, 95th Cong., 1st Sess. 5 (1977)). In sum, the sentence that petitioner received is within the statutorily prescribed range, and it is not unconstitutionally excessive for conduct involving the sexual exploitation of minors (see *Solem* v. *Helm*, 463 U.S. 277 (1983); *United States* v. *Tucker*, 404 U.S. at 447; *United States* v. *Givens*, 767 F.2d at 585).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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